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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321

THE CREEK NATION,

Petitioner,

vs.

THE UNITED STATES.

No. 322

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

BRIEF OF PETITIONERS

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF PETITIONERS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Creek and Seminole Nations of Indians, petitioners herein, respectfully present the following data for the consideration of the Court upon the review of these cases:

Opinion Below.

The opinion of the Court of Claims is not as yet reported (Creek case, R. 12-21).

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 in both the Creek and Seminole cases (Creek case, R. 21; Seminole case, R. 11-13). The petition for writs of certiorari was filed on August 21, 1942, and was granted on October 19, 1942 (Creek case, R. 21; Seminole case, R. 12). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Judicial Code, as amended, 28 U. S. C. A. 129).

Statutes Involved.

The special jurisdictional act approved May 24, 1924, c. 181, 43 Stat. 139, reads in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States. * * *"

The special jurisdictional act of the Seminole Nation was approved May 20, 1924, c. 162, 43 Stat. 133, and is substantially the same as the above act of the Creek Nation.

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, not-

withstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; * * *".

The Treaty of June 14, 1866; 14 Stat. 785-788, between the Creek Nation and the United States provides in part as follows:

"Article I. * * * They also agree to remain at peace with all other Indian tribes; and, in return, the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

* * * * * * *

"Article V. The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, * * *".

* * * * * * * * *

"Article X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: * * *"

Articles I, V and VII of the Treaty of March 21, 1866, 14 Stat. 755, 756-758, between the Seminole Nation and the United States, contain substantially the same provisions as those of the Creek treaty above quoted.

The Act of February 28, 1902, c. 134, 32 Stat. 43, 47, 48, provides in part as follows:

> "Sec. 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated; * * * "
>
> "Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; * * *"

The Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, 144, provides in part as follows:

> "Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;"
>
> * * * * * * * *
>
> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or

Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits:"

Questions Presented.

The questions presented are as follows:

1. Whether the United States, as guardian of the Creek and Seminole Nations, can knowingly permit railroad companies to fence up and segregate from the lands of said tribes what are known as "station reservations" which were never used for railroad purposes, and thus permit unlawful intrusions upon the lands owned by said tribes in fee simple, and then fail and refuse to act to protect the interests of said tribes, without becoming liable for the resulting loss occasioned to its Indian wards.

2. Whether the United States is liable to the Creek and Seminole Nations for its failure to enforce against said railroad companies on behalf of said tribes the guarantee of quiet possession to lands of their national domain intruded upon by said railroad companies, which guarantee is contained in the treaties with said Indian tribes.

3. Whether or not the United States is liable to the Creek and Seminole Nations for its failure to collect for the benefit of the tribes the rents and profits derived by said railroads from the lands of petitioners, thus unlawfully intruded upon and held by said railroad companies.

4. Whether the United States, as guardian of said tribes, is liable to them for its failure to enforce against said railroad companies for the benefit of said tribes the provisions of statutes passed for their benefit.

5. Whether the United States, as guardian of petitioners, is liable for its failure to enforce against said railroad companies the provisions of the Act of February 28, 1902, c. 134, 32 Stat. 43, prescribing benefits for petitioners.

6. Whether the Act of April 26, 1906, c. 1876, 34 Stat. 137, is mandatory in effect, requiring the United States, as guardian, to act to protect the property interests of its Indian wards.

Statement.

These cases involve the same issues and came before the lower court on demurrer to the amended petitions filed by petitioners. As the Creek and Seminole treaties of 1866 are substantially the same, and the subsequent statutes involved apply to the Creek and Seminole Nations alike, the decision of the lower court in the Creek case applies equally to the Seminole case. To simplify our discussion we have confined it largely to the Creek case and request that the Court consider it as applicable equally to the Seminole case.

The petitions embody five causes of action, the facts of which are admitted by the demurrer. We outline the facts briefly as follows:

First Cause of Action.

The Creek Nation owned its national domain in fee simple (Treaty of February 14, 1833, Arts. 2, 3; 7 Stat. 417, 418-419).

By Treaty of June 14, 1866, 14 Stat. 785, 786 (Art. 3) the Creek Nation ceded to the United States one half of its entire domain, and retained the eastern half as its permanent national domain. By Article 5 of said treaty the Creek Nation granted a right of way to two railroads duly authorized by Congress, and with the express consent and approbation of the Secretary of the Interior, to construct railroads through the Creek national domain. Article 1

provided that the United States guarantee to the Creek Nation quiet possession of the lands not granted in said treaty.

The two treaty railroads constructed lines through the Creek domain under the provisions of said treaty of 1866. However, in addition to the right-of-way granted by the treaty, respondent permitted said railroads to intrude upon and fence up various twenty acre tracts at points along said rights-of-way, which were called "station reservations" These "station reservations" were not essential to the operation of said railroads, and were never used for railroad purposes, but have been leased and rented by said railroad companies to third parties for purposes other than for railroad purposes, and said lands have provided a considerable source of revenue to said railroads from the lands owned by petitioner.

These violations of the treaty by said railroad companies were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Article 5, and to enforce for the benefit of petitioner the guarantee of quiet possession contained in Article 1 of said treaty, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty, petitioner contends that respondent is liable for the loss thus occasioned to petitioner (Creek case, R. 2-5; Seminole case, R. 2-4):

Second Cause of Action.

The second cause of action is similar to the first cause of action, except that the authority of said railroad companies to construct lines through the Creek national domain was not derived from the Treaty of June 14, 1866, but arose out of the provisions of the Act of February 28, 1902, c. 134, 32

Stat. 43. Under this act various other railroads were authorized to construct lines through the Creek national domain; under the conditions prescribed in said act.

The respondent permitted these railroads also to intrude upon the fenced up "station reservations" in addition to the lands taken for the rights of way, as did the two treaty railroads. These "station reservations" were not necessary for the operation of said railroads, and were never used for railroad purposes, but were leased and rented out by said railroad companies to third parties for purposes other than for railroad purposes, which have provided a considerable source of revenue to said railroad companies from the lands owned by petitioner.

These conditions were well known to respondent, but it permitted them to continue to exist; and although the respondent was in duty bound to supervise the action of said railroads under said Act of February 28, 1902, to enforce the provisions of said act for the benefit of petitioner, and to enforce for the benefit of petitioner, the guarantee of quiet possession contained in the Treaty of June 14, 1866, yet respondent took no steps to put petitioner in possession of its lands, and thus petitioner has been deprived of the use and possession of same, and the rents and profits derived by said railroads therefrom. And because of said failures of respondent to comply with said treaty and to enforce said Act of February 28, 1902, petitioner contends that respondent is liable for the loss occasioned to petitioner (Creek case, R. 5-7; Seminole case, R. 5-6).

Third Cause of Action.

The third cause of action sets forth the failure of respondent to enforce Sections 15 and 16 of the Act of February 28, 1902 against said railroads for the benefit of petitioner.

Under Section 15 of said act the railroads were required to pay to the tribe compensation for the lands taken for

railroad purposes. It is alleged and admitted on demurrer that no such compensation was paid petitioner under the provisions of said Section 15.

Under Section 16 of said act the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes an annual charge of fifteen dollars per mile for each mile of road constructed, to be paid as long as said lands shall be owned and occupied by said tribes. It is alleged and admitted on demurrer that petitioner owns and occupies said lands but that the respondent has failed to collect this annual charge for the benefit of petitioner under said Section 16, and that respondent is liable to petitioner for such failure (Creek case, R. 7-9; Seminole case, R. 6-8).

Fourth Cause of Action.

The fourth cause of action sets forth the failure of respondent to comply with Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141. Under this provision the Secretary of the Interior was directed to collect *all* revenues of whatever character accruing to said Indian tribes. However, respondent failed to collect the rents and profits derived from the lands of petitioner wrongfully intruded upon by said railroad companies, and for said failure the petitioner contends that respondent is liable for the amount of which it was so deprived (Creek case, R. 9; Seminole case, R. 8).

Fifth Cause of Action.

The fifth cause of action embodies all of the allegations of the four preceding causes, and simply stated, alleges that under Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the Secretary of the Interior was authorized to bring suit for the collection of any moneys or for the recovery of any land claimed by these tribes. Although well knowing of the intrusions by the railroads upon the lands of petitioner, yet respondent failed to act on behalf of petitioner to recover the lands, or the profits derived

therefrom. Thus petitioner has been deprived of the benefits of said Section 18, and petitioner contends that respondent is liable for the loss occasioned to it (Creek case, R. 10-11; Seminole case, R. 9-10).

The petition further alleges that petitioner had no means of recovering in its own name the lands thus intruded upon, or to collect the moneys from said railroad companies, except through the action of the United States (Creek case, R. 11; Seminole case, R. 10).

The petition prays that judgment be entered against respondent for the full present value of the lands embraced in said station reservations thus unlawfully intruded upon by said railroad companies, which respondent failed and refused to restore to petitioner after a full knowledge of the facts; that respondent be required to account to petitioner for the amounts respondent failed to collect for the benefit of petitioner under Sections 15 and 16 of said Act of February 28, 1902, and for the rents and profits from petitioner's lands thus unlawfully intruded upon, which respondent permitted said railroad companies to divert into their own coffers (Creek case, R. 11; Seminole case, R. 10).

The lower court dismissed the petition, holding in effect, that respondent was not liable for its failure to enforce the guarantee of quiet possession contained in said Treaty of June 14, 1866; that respondent, as guardian of petitioner, owed petitioner no duty to act to protect the interests of its Indian wards from the inroads of said railroad companies, even though it was required to supervise the action of said railroads under the provisions of said treaty, and had a full knowledge of the facts; and, further, that respondent was not required under the Acts of February 28, 1902 and April 26, 1906 to enforce the benefits accruing to petitioner under the provisions of said acts, even though the petitioner was unable to act on its own behalf to protect its property interests, but was required to rely upon the action of the United States, its guardian (Creek case, R. 10-11; Seminole case, R. 9-10).

The petitioner believes that the lower court erred in this holding, and contends generally that the respondent, as guardian of petitioner, was required to take affirmative action to protect the petitioner in the possession of its lands, and to protect petitioner in this case against the inroads of said railroad companies, and to enforce the provisions of the Treaty of 1866 on behalf of petitioner, after respondent had a knowledge of the facts, and when it was known to respondent that said railroads were intruding upon lands owned by petitioner and were not using them for railroad purposes. Also that respondent is liable to its ward for the failure to enforce against said railroad companies statutes passed for the benefit of petitioner.

Specification of Errors to Be Urged.

The court below erred:

1. In holding that the United States, as guardian of petitioner, is not required to act to protect the lands of petitioner from unlawful intrusion by railroad companies authorized to construct lines of railroad through the lands of petitioner, after respondent had a full knowledge of said intrusions, and when it by solemn treaty stipulation guaranteed to petitioner quiet possession of its national domain.

2. In holding that the guarantee of quiet possession by the United States to the Creek Nation in the Treaty of June 14, 1866, 14 Stat. 785, does not require the respondent to act to protect petitioner in the quiet possession of its lands, when respondent knew of intrusions by said railroad companies.

3. In holding that the United States, as guardian of petitioner, was under no duty to act to protect the petitioner in the receipt of the benefits prescribed by the Act of February 28, 1902, even thought that act required the Secretary of the Interior to collect certain of the revenues due said Indian nation from said railroad companies.

4. In holding that the procedure prescribed by said Act of February 28, 1902, for the ascertainment of damages to the Indian tribes for the right of user to lands necessarily taken for railroad purposes, provided a full and complete means for compensating said tribes for the value of the fee simple title to the lands of petitioner unlawfully intruded upon by said railroads, which lands were *never* used for railroad purposes.

5. In holding that the United States was not required to act under Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141, to collect all revenue due petitioners from all sources, including the income derived by said railroad companies from the lands of petitioner thus unlawfully intruded upon, and leased by said railroads to third parties for commercial purposes.

6. In holding that the United States, as guardian of petitioner, was not in duty bound to file suit to recover from said railroad companies the lands of petitioner thus unlawfully intruded upon, and to recover the amounts received by said railroads from leases of said lands of petitioner, when respondent knew that petitioner was unable to proceed in its own behalf to protect its property interests, but was required to rely upon the action of the respondent for the needed protection of its interests.

7. In holding that said Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, is permissive and not mandatory in effect.

8. In holding that the respondent, as guardian of petitioner, is not liable to its ward when respondent ties the hands of its ward so that it cannot take legal steps of its own to protect its property interests, and respondent then itself fails and refuses to act to protect the property interests of its ward after it has assumed that duty.

Summary of Argument.

The argument on behalf of petitioners may be summarized as follows:

The petitioners contend generally that the United States, as guardian of the Creek and Seminole Nations, was in duty bound to enforce for the benefit of these dependent Indian wards, the provisions of treaties between the United States and said nations, and Acts of Congress defining the rights of railroad companies constructing roads through the domain of said Indian nations, and prescribing protection and other benefits for petitioners; and that if the United States fails in this duty it is liable to said Indian wards for any losses occasioned to the trust estates.

In developing this issue we discuss the provisions of the Treaties of 1866 between the petitioners and respondent, in which the United States expressly guaranteed to these Indian nations the quiet possession of the lands retained by them as their permanent national domains; and also the provisions granting lands to railroads for *necessary* railroad purposes and constructing railroads through the lands of petitioners under the supervision of the United States.

We discuss also the Act of February 28, 1902, c. 134, 32 Stat. 43, under which railroads generally were granted lands of petitioners for *necessary* railroad purposes, under conditions prescribed in said act.

The first and second causes of action present claims for the violations of said Treaties of 1866 and the Act of February 28, 1902. The facts show that respondent permitted the railroads to intrude upon the lands of petitioners and fence up certain tracts for what are known as "station reservations," which were never used for railroad purposes, but which have been rented out and leased by said railroads for commercial purposes, and that the income from these lands of petitioners was retained by said railroads. That the United States, having knowledge of the facts, failed to enforce for the benefit of petitioners the protection due

them under treaty and statutes, and also failed to enforce the guarantee of quiet possession contained in said treaties of 1866, and therefore is liable for the value of the lands and the income therefrom of which petitioners have been deprived.

We further discuss the decisions of this Court in United States v. Creek Nation, 295 U. S. 103, and Seminole Nation v. United States, 315 U. S. —, and other decisions setting forth the views of this Court and holding that these dependent Indian wards were entitled to rely upon the United States, their guardian, for the needed protection of their interests, and that the United States is liable to the tribes for its failure to act to protect the trust estates from loss.

With respect to the third, fourth and fifth causes of action we discuss the particular benefits prescribed by Congress for petitioners under the Acts of February 28, 1902, and the Act of April 26, 1906, c. 1876, 34 Stat. 137, and the duty of the United States to enforce these benefits for these Indian wards.

We contend that the duty of the United States, as guardian of these dependent Indian wards, does not end with the enactment of the statutes prescribing these benefits, but that it was the duty of the United States to enforce for the benefit of its wards the protection and benefits prescribed by said statutes.

With respect to Section 18 of the Act of April 26, 1906, we contend that the United States was required to file suits to recover any lands claimed by these Indian nations, or for the collection of any moneys due them; that this act was mandatory in effect, and required affirmative action on the part of the guardian in the interests of its wards; that it required the United States to file suits for the recovery of the lands within said "station reservations" which were never used for railroad purposes, and for the recovery of the profits derived by said railroads from the lands of petitioners.

We further point out that the petitioners, being under guardianship, were not able to act in their own behalf, but were required to rely upon the action of the United States; that under said Act of April 26, 1906 the United States assumed the duty of acting on behalf of petitioners, but then did nothing to enforce the rights of petitioners neither with respect to their lands nor the income therefrom of which they have been thus deprived. We contend that under these circumstances the respondent is liable to petitioners for the resulting losses to the trust estates.

Argument.

This Court has granted certiorari to review the decision of the Court of Claims on the demurrers to the petitions, dismissing the petitions in the two cases now consolidated for review by this Court.

The main question before the Court on the review of these cases is whether the United States, as guardian of the Creek and Seminole Nations of Indians, is in duty bound to enforce for the benefit of petitioners the provisions of treaties between petitioners and respondent, and other Acts of Congress regulating the rights of railroad companies constructing railroads through the domains of said nations. In other words, whether respondent as guardian of petitioners, is in duty bound to enforce against third parties for the benefit of petitioners the provisions of said treaties and Acts of Congress prescribing protection and benefits for petitioners.

It is the contention of petitioners that it was the duty of the United States, as guardian of these Indian tribes, to protect them from the unauthorized intrusions of railroads upon the lands of these nations, and also to enforce on behalf of petitioners the protection and benefits guaranteed to and prescribed for them in said treaties and Acts of Congress.

The issues involve the provisions of the treaties of March 21, 1866, 14 Stat. 755, and June 14, 1866, 14 Stat.

785; between the Seminole and Creek Nations, respectively, and the United States, and the Acts of February 28, 1902, c. 134, 32 Stat. 43, and April 26, 1906, c. 1876, 34 Stat. 137. We will discuss below these provisions and their relation to the issues herein presented.

The Creek and Seminole Nations owned their national domains in fee simple.

Both the Creek and Seminole Nations owned their national domains in fee simple, and the lands thus held by them are involved in these proceedings.

The Creek Nation acquired said national domain under the provisions of the Treaty of February 14, 1833, Articles 2 and 3, 7 Stat. 417, 418-419. By Treaty of June 14, 1866, 14 Stat. 785, 786 (Art. 3), the Creek Nation ceded to the United States the western half of its entire domain, and reserved the eastern half as its permanent national domain, and Article 1 provided in part that "the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes." *

In reviewing the title of the Creek Nation this Court, in United States v. Creek Nation, 295 U. S. 103, 109, said:

> "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possesion. The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government."

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* The Seminole treaty of March 21, 1866, 14 Stat. 755, 756, contains the grant of the United States to the Seminole Nation of its national domain, and also the guarantee of quiet possession similar to that set forth in the Creek treaty.

The Two Treaty Railroads.

Article 5 of said treaty of June 14, 1866 provides in part as follows:

> "The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary. * * *"

Thus by said Article 5 two railroads were granted *rights-of-way* through the Creek national domain. Really, in effect, the Creek Nation granted to the United States the right-of-way for two railroads, which the United States would in the future authorize to construct railroads through the Creek Nation. The width of the right-of-way was not specified, but was left to the discretion of respondent.

Pursuant to said Article 5, the Act of July 26, 1866, c. 270, 14 Stat. 289, authorized the Union Pacific Railroad Company (now the Missouri, Kansas and Texas Railroad), to construct a railroad through Indian Territory; and by Act of July 27, 1866, c. 278, 14 Stat. 292, the Atlantic and Pacific Railroad Company (now the Saint Louis and San Francisco Railroad), was authorized to construct a railroad through the Indian Territory. Both of said acts granted a right-of-way of 200 feet in width, and also "all *necessary* grounds for stations," etc.

Congress authorized railroads generally to construct railroads through Indian Territory by Act of February 28, 1902.

The statement of the lower court that the Act of February 28, 1902, c. 134, 32 Stat. 43, was passed pursuant to the Treaty of June 14, 1866 (Creek case, R. 15) is clearly

in error, for we have seen that just two railroads were granted rights-of-way under this treaty, and the acts of Congress passed pursuant thereto. However, by the Act of February 28, 1902, Congress authorized railroads generally to acquire lands for rights-of-way and for other *necessary* railroad purposes, and to construct railroads through Indian Territory under the conditions prescribed by said act.

The railroads intruded upon the lands of petitioners and staked out "station reservations" not necessary for railroad purposes.

Rights-of-way of 200 feet in width were taken by the railroads constructing railroads through the lands of petitioners. Experience over a long period of years has shown that these rights-of-way through a level, prairie country were sufficient for station grounds, etc. However, in addition to these rights-of-way, said railroads—dealing entirely with respondent and not with petitioners—fenced up and intruded upon various tracts of petitioners' lands known as "station reservations," each containing approximately 20 acres. These "station reservations" were not necessary for railroad purposes, and have never been used for railroad purposes, but have been leased and rented by said railroads to third parties for purposes wholly unconnected with the operation and maintenance of said railroads, and the rents and profits from the lands of petitioners have been going into the coffers of said railroads, with the acquiescence of respondent.

Let us say to the Court that the treaty of 1866 by implication grants *necessary* station reservations, along with the right-of-way, and in this respect the treaty and the statutes above referred to are similar to each other—they grant station grounds if *necessary*. However, neither the treaty nor any act of Congress warrants the intrusions herein complained of.

The gravamen of our complaint is that while the railroads did acquire rights-of-way either by treaty or statute,

neither the treaty nor any statute gave these 20 acre "reservations," which were *not necessary* to the enjoyment of the right-of-way, and upon which the railroads *simply intruded*.

The First and Second Causes of Action.

The first and second causes of action present a claim for the value of the lands of petitioners included within said "station reservations," which were not necessary for railroad purposes and were never so used, and which respondent permitted said railroads to fence up and retain in violation of the Treaties of 1866 and the Act of February 28, 1902.

The demurrer of respondent (defendant below) admits:

1. That under the treaties of 1866 it was the duty of the respondent to supervise the grants of lands of petitioners to railroads under said treaties and the Act of February 28, 1902, and to protect petitioners in the quiet possession of the lands not so granted.

2. That the fencing up of said "station reservations" by said railroads were unauthorized and unlawful intrusions upon the lands of petitioners, and were permitted by respondent in violation of said treaties of 1866 and of the Act of February 28, 1902.

3. That said "station reservations" were not necessary to the operation of said railroads and were never used for railroad purposes, but have been rented and leased by said railroads for purposes unconnected with the operation of said railroads, and that the railroads were thus deriving a profit from the lands belonging to petitioners, which were not granted to said railroads by the Treaties of 1866 or the Act of February 28, 1902.

4. That said intrusions were well known to respondent, but that it has failed and refused to put petitioners in possession of said lands.

5. That petitioners have no means of recovering in its own name said "station reservations," but must rely upon the action of the United States.

The United States, as guardian of petitioners, knew of these violations of the Treaties of 1866 and the Act of February 28, 1902, and of the unlawful intrusions by the railroad companies upon the lands of petitioners, yet permitted these conditions to exist, and petitioners now contend that the respondent is liable for the value of said lands thus lost to petitioners because of the failure of respondent to enforce the protection guaranteed by it in the Treaty of 1866.

With respect to the first and second causes of action the lower court states (Creek case, R. 16):

> "A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the Choctaw and Chickasaw Nations, supra."

The petition in the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was defective in that, as the lower court pointed out (p. 498):

> "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * * "

And after reviewing the provisions of the Act of 1902, the lower court further stated (p. 501) that there is "no provision of the act imposing liability upon the Government as herein claimed."

We drew our amended petitions with the Choctaw and Chickasaw case decision before us, and cited the treaties and acts of Congress under which we claimed the benefits. In this case we make no claim except for the protection guaranteed us by treaty and by statutes passed for our benefit. The distinction between the Choctaw and Chickasaw case and the case at bar was recognized by the lower

court when it reinstated our case after the decision of the Choctaw and Chickasaw case (Creek case, R. 2). Clearly the decision in the Choctaw and Chickasaw case has no application to the case at bar.

Furthermore, the Choctaw case was decided (June 6, 1932) before the passage of the Act of August 16, 1937, c. 651, 50 Stat. 650, giving the Court of Claims power to adjudicate "any and all legal and equitable claims" of said Indian nations, thus making it unnecessary that the claims presented by amended petition arise and grow out of treaties and Acts of Congress.

By treaties of 1866 the Respondent guaranteed Petitioners quiet possession of their lands.

We submit that the lower court erred in placing too narrow a construction on the guarantee of quiet possession made by the United States to the petitioners in said treaties of 1866. The lower court said (Creek case, R. 16):

> "We think this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff."

A mere glance at the Treaty of June 14, 1866 (Art. 1), shows that this construction is not justified. The treaty states:

> "the United States guarantees them quiet possession of their country, and protection against hostilities on the part of other tribes. * * *"

Thus the treaty not only guarantees the Creek Nation quiet possession of their domain, but also protection against hostilities of other tribes.

While it is true that the guarantee of quiet possession does not apply to the rights-of-way granted to the railroads as the lower court points out (Creek case, R. 16),

yet this guarantee does apply to the lands intruded upon by the railroad companies which were never used for *necessary* railroad purposes.

As we have heretofore seen, this Court in the Creek case, 295 U. S. 103, 109, recognized this guarantee of quiet possession of the United States to the Creek Nation (see supra, p. 16).

The *Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, cited by the lower court in support of the above construction, has no application to the question before us for that case dealt with a right of occupancy title and not a fee simple title, and there was no solemn guaranty of quiet possession in the Nez Perce treaty, as is contained in the Creek and Seminole treaties. In the case at bar the United States, by solemn treaty obligation, guaranteed the Creek and Seminole Nations quiet possession of their unceded national domain, and *in addition* protection from the hostilities of other tribes. Furthermore, the intrusions in the Nez Perce case were not controlled by the United States. In the cases at bar the action of the railroad companies was directly supervised and controlled by the United States. Under Article 5 of the Treaty of June 14, 1866 only the railroads "which shall be duly authorized by Congress, and shall, with the express consent of the Secretary of the Interior," could construct said railroads through Creek country.

We submit that *The Pine Hill Co. v. United States*, 259 U. S. 191, 196, has no application to the question before us, for in that case the claims presented did not come within the scope of the jurisdictional act; and it did not involve a guardian and ward relationship.

Therefore, the United States, by treaty of 1866, having agreed to protect the petitioners in their property interests, and having guaranteed to its wards the quiet possession of their national domain, failed to protect the interests of petitioners in the lands unlawfully intruded upon by said railroad companies, and therefore became liable to

petitioners for the value of said lands embraced within said "station reservations."

This court has held in *United States* v. *Creek Nation*, 295 U. S. 103, 110, that:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests."

This Court has further defined the obligations of the United States, as guardian of the Indian tribes, in the recent case of *The Seminole Nation* v. *United States*, No. 348, October Term, 1941, decided May 11, 1942, 315 U. S. —, as follows:

> "Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E. g. The Cherokee Nation *v.* The State of Georgia, 5 Pet. 1; United States *v.* Kagama, 118 U. S. 375; Choctaw Nation *v.* United States, 119 U. S. 1; United States *v.* Pelican, 232 U. S. 442; United States *v.* Creek Nation, 295 U. S. 103; Tulee *v.* State of Washington,—U. S.—, No. 318 this Term. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Therefore, in the light of the above expressions by this Court, we submit that the decision of the Court of Claims—holding that the United States has no obligation to protect

the petitioners in their lands thus unlawfully intruded upon by said railroads, and that respondent owes no obligation to petitioners under the guarantee of quiet possession as contained in the Treaty of 1866—is contrary to the applicable views of this Court on this question.

The Third, Fourth and Fifth Causes of Action.

The third, fourth and fifth causes of action involve the rights of petitioners to the benefits prescribed by Congress in the Acts of February 28, 1902, c. 134, 34 Stat. 43, and April 26, 1906, c. 1876, 34 Stat. 137, which respondent failed and refused to enforce on behalf of petitioners.

Duties of Respondent under the Act of February 28, 1902.

The third cause of action is based upon the failure of the respondent to collect for the benefit of petitioners the compensation provided in Sections 15 and 16 of the Act of February 28, 1902.

Section 15 of said Act of February 28, 1902, provides for the payment by the railroads of compensation to the Indian tribes for the lands taken for necessary railroad purposes. The petition alleges and the demurrer admits that no such compensation was ever paid by said railroads.

Section 16 of said Act of February 28, 1902, provided that the railroads pay to the Secretary of the Interior for the benefit of the tribe or nation through the lands of which the railroads are constructed—

> "an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

The petition alleges and the demurrer admits that this annual charge has not been paid in full; that the petitioners own and occupy the lands constituting said rights-of-way;

that respondent has neglected to collect said annual charge from the railroads, and has not accounted to petitioners for same.

The lower court further held that the duty of the United States was wholly discharged by the mere enactment of said Act of February 28, 1902 disposing of petitioners' lands to the railroads, and prescribing the procedure for the determination of the compensation to be paid by said railroads to the Indian nations, and that the United States, as guardian, owed no duty to protect the interests of its Indian wards from the violations of said act by said railroad companies (Creek case R. 19-20). In other words, the lower court held that by the mere enactment of the statute disposing of its wards' lands it could then wash its hands of the whole matter—this holding notwithstanding the fact that respondent had full administrative control over the property and affairs of these tribes (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294).

We submit that this holding is contrary to the decisions of this Court referred to supra, p. 23.

The lower court failed to notice that the compensation thus provided for in the Act of February 28, 1902 was for the right of user in lands *properly* taken for *necessary* railroad purposes; and also that the procedure therein provided applied to cases in which the amount of damages was in dispute. Also this provision would apply principally to the claim for compensation under Section 15 of said act, which is embodied in the third cause of action; it would not apply to the claim of petitioners for the additional compensation due under said Section 16 wherein the railroads were directed to pay to the Secretary of the Interior the annual charge of fifteen dollars per mile for each mile of road constructed.

Clearly the procedure prescribed by the act of 1902 would not apply to a claim for the value of the fee simple title to petitioners' lands included in the "station reservations" and *never* used for railroad purposes, which is the subject

matter of the first, second and fifth causes of action. As heretofore stated, the essence of the case in the main is the claim of the petitioners for the value of the lands included in said "station reservations," which the railroads unlawfully intruded upon, and which were never used for railroad purposes. The respondent, well knowing the facts, utterly failed in its duty to take steps to protect the interests of its Indian wards, thus causing the loss of which petitioners now complain.

It is also to be remembered that the Act of February 28, 1902 was an arrangement made by the United States directly with the railroads. The Act affected the lands of petitioners, and provided certain benefits to be enforced for the benefit of petitioners. There is nothing in the act which would prevent the United States, as the guardian of petitioners, from enforcing the provisions enacted for the benefit of its dependent Indian wards. In fact, the act contemplated the supervision of the railroads by the United States. The railroads were required to file with the Secretary of the Interior maps of definite location, and these were required to be approved by him (Secs. 6, 15); employees of the railroads necessary for the construction and management of the railroads were authorized to reside on the rights-of-way under rules and regulations established by the Secretary of the Interior (Sec. 7); all mortgages executed by the railroads were required to be recorded in the Department of the Interior (Secs. 11, 20); and the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes fifty dollars for each mile of road constructed (Sec. 5), compensation and damages for necessary lands taken (Sec. 15), and in addition, the railroads were required to pay to the Secretary of the Interior for the benefit of the tribes an annual charge of fifteen dollars per mile for each mile of road constructed (Sec 16).

We submit that under these circumstances the act contemplated that the United States enforce for the benefit of petitioners the provisions of the act providing benefits

to petitioners for the lands taken thereunder for necessary railroad purposes. Certainly the imposition of these requirements by the United States upon the railroads for the benefit of petitioners, would imply the power in the United States, as guardian of these dependent Indian nations, to enforce them (*Heckman* v. *United States*, 224 U. S. 413, 438).

In the Heckman case, under authority of an Act of Congress, the United States brought various suits in equity against third parties to cancel conveyances of allotted lands upon the ground that the conveyances were made in violation of existing restrictions upon the power of alienation contained in the agreements between the United States and the Indians of the Five Civilized Tribes and under Acts of Congress. A demurrer was filed questioning the right of the United States to maintain said suits. This Court concluded that the suits were well brought, and further stated (pp. 437, 438):

> "During the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe permits no other conclusion. Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen.' *United States* v. *Kagama*, 118 U. S. 375, 384."
>
> "As well said by the court below, 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to under-

take the difficult and protracted litigation necessary to set aside their own acts?' To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A trasfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions of this character is the necessary complement of the power to impose them."

Thus we submit that the authority of the United States to enact legislation providing benefits to petitioners carries with it the power to enforce said benefits on behalf of its dependent Indian wards, and that clearly it was the duty of respondent to do so (Cohen's Handbook of Federal Indian Law, pp. 366-370).

In Cohen's Handbook of Federal Indian Law, p. 366, it is stated:

"* * * It is well settled that the United States, by virtue of its peculiar relations with the Indians—often called 'guardianship'—or as trustee of their property, has the capacity *and the duty* to effectuate Government policies by protecting and enforcing their rights in property held by it as trustee, or by the Indians themselves in fee simple, subject to restrictions on alienation." (Italics ours).

In the *United States* v. *Osage County*, 251 U. S. 128, 133, this Court said:

"Certain is it that as the *United States as guardian of the Indians had the duty to protect them from spoliation* and, therefore, the right to prevent their being illegally deprived of the property rights conferred under the Act of Congress of 1906, the power existed in the officers of the United States to invoke relief for the accomplishment of the purpose stated. Indeed the Act of Congress of 1917, providing for the appraisement of

the lands in question, *by necessary implication*, if not in express terms, treated the power of the officers of the United States to resist the illegal assessments as undoubted." (Italics ours).

Therefore, we submit that the United States was under a *duty* to enforce the benefits provided for petitioners in the cases at bar.

The Duties of the United States Under the Act of April 26, 1906.

The fourth and fifth causes of action involve the rights of petitioners to the benefits prescribed by Congress in the Act of April 26, 1906, c. 1876, 34 Stat. 137.

We submit that the United States, as guardian of petitioners, was required to enforce for the benefit of petitioners the provisions of said Act of April 26, 1906, and that the lower court erred in holding that the respondent was under no duty to act to protect the interests of its dependent Indian wards under this act.

Section 11 of said Act of April 26, 1906 required the Secretary of the Interior to collect all *revenues of whatever character* accruing to the petitioner. The lower court states that the allegations of the fourth cause of action would merely give rise to an action for trespass. Clearly the United States could have proceeded under this provision of law to collect the revenues arising out of the lands of petitioners thus unlawfully intruded upon by the railroad companies.

Section 18 of the Act of April 26, 1906, provided in part as follows:

> "That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek, or Seminole tribes * * * for the collection of any moneys or recovery of any land claimed by * * * said tribes."

Thus this act, by Sections 11 and 18, required not only that the Secretary of the Interior *shall* collect all revenues of whatever character due the tribes, but also he was specifically authorized to bring suit to enforce said collections and to recover lands claimed by said tribes.

Although said Section 18 is permissive in form, yet we submit that it is mandatory in effect. In 25 R. C. L., p. 770, it is stated:

> "* * * Hence, permissive words used in statutes conferring power or authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals. The word 'may' in statutes conferring power upon public officers or official boards or tribunals may be so construed as to be the equivalent of 'shall' or 'must' where the public or individuals have an interest in the exercise of the powers conferred."

See also *Supervisors* v. *United States*, 4 Wall. 435; *French* v. *Edwards*, 13 Wall. 506; *Jaffray* v. *McGehee*, 107 F. S. 361.

Clearly this principle would apply with greater force when a fiduciary relationship exists between the parties.

We submit that the lower court erred in holding that said Section 18 was permissive and not mandatory in effect. Especially is this true when it is further considered that the Indian ward was unable to act on its own behalf, and its rights could be enforced only by action of the United States, its guardian.

The lower court criticizes our reference to *United States* v. *Creek Nation*, 295 U. S. 103, 109, and states that this case is not applicable to the question before us because that case was based upon facts which showed a direct liability on the part of the United States to its Indian ward (Creek case, R. 18).

In the Creek case (295 U. S. 103, 109-110) this Court said:

"* * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that 'would not be an exercise of guardianship, but an act of confiscation.' Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 113; Cherokee Nation v. Hitchcock, 187 U. S. 294, 307-308."

The failure of the United States to file suit under this very Section 18 of the Act of 1906, was one of the elements considered by this Court in the Creek case in determining the liability of the United States. This Court said in that case (295 U. S. 103, 110):

"Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction."

In the Creek case this Court held that the failure of the United States to act to protect the Creek Nation in the possession of its lands after a full knowledge of the facts, created a taking of said lands by the United States, and in that case this Court did not require an express promise by the United States that it would be liable for the failure to act to protect its Indian ward, before the liability of the United States would arise. Clearly the statement of the lower court—to the effect that there would have to be an express statutory provision imposing liability on the Government if it fails to bring suit on behalf of its Indian ward (Creek case, R. 18)—is in error, as the law itself imposes liability on the guardian when it fails to act to protect the interests of its ward.

Clearly the United States could have filed suit to quiet title in the Creek Nation to lands embraced within said "station reservations", and therein demanded an accounting from the railroads for the rents and profits derived from the lands owned by petitioners. In the case of *United States, As Guardian of the Hualpai Tribe* v. *Sante Fe Pacific Railroad Company*, 314 U. S. 339, this Court held that the United States, as guardian of said Indian tribe, could demand of the railroad company an accounting for amounts received from lands leased by said railroad to third parties, with respect to the lands held by said tribe by immemorial possession.

In the cases at bar the petitioners owned the fee simple title to the lands in question, and the railroad companies were granted merely a right of user to such lands only that were *necessary* for railroad purposes. The lands enclosed in said "station reservations" were never used for railroad purposes, and were not necessary for the operation of said railroads, but were leased by them to third parties, and the income derived therefrom went into the coffers of the railroad companies. These facts were known to the United States, and although having the duty to act on behalf of its Indian ward, and having the power to demand an accounting of the railroads for said rents and profits, as is evidenced by the holding in the Hualpai case, and being under a further duty to act to protect the interests of petitioners under the provisions of the treaty of 1866, yet respondent did nothing to protect the interests of its Indian ward.

We are not forced to rely upon a violation of the plain provisions of Article V of the Treaty of June 21, 1866 alone. By Article X of the same treaty, the Creeks agreed that Congress may pass such legislation as it deems necessary for their protection. By Section 18 of the Act of April 26, 1906, the Secretary of the Interior was authorized to bring suit in the name of the United States for the recovery of

the possession of these lands. By Section 27 of the same act, these lands are held in trust by the United States for us. We claim the protection of this act, and contend that such protection was withheld from us. Our causes of action, therefore, are founded upon liabilities assumed by the defendant under positive treaties and statutes.

Thus the respondent, under the Treaty of 1866, took upon itself the duty of handling this matter for petitioners; under the rights granted to it to pass legislation for our benefit, it has seen fit to take away from us the right for us to bring suit to recover the possession of these lands ourselves; under the Act of April 26, 1906 it has seen fit to assume that duty itself; and respondent has done nothing.

Furthermore, R. S. 2114; Title 25, Sec. 174, p. 1007, U. S. Code (from Act of May 28, 1830, c. 148, 4 Stat. 411, 412), which applied to petitioners, provides:

> "The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the Act of May 28, 1830, 'to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi'; and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever."

We submit that under the applicable decisions of this Court the United States is liable for its failure to perform its plain treaty and statutory duties to its dependent Indian wards.

Conclusion.

For the reasons set forth above we respectfully request that this Court reverse the decision of the lower court and direct it to bring its views into conformity with the applicable views and decisions of this Court.

Respectfully submitted,

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